



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 8, 2004

Ms. Rebecca L. Payne
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2004-0157

Dear Ms. Payne:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193950.

The Texas Department of Human Services (the "department") received a request for findings pertaining to a specified complaint. You state that "[m]uch of the requested information is being released to the requestor" but inform us that the department will withhold some responsive information from the requestor pursuant to the previous determination issued in Open Records Letter No. 2001-5348 (2001). *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 673 at 6-9 (2001) (criteria of previous determination regarding specific categories of information). You claim that other requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You claim that certain information that is contained within the submitted Statement of Licensing Violations and Plans of Correction form (the "state form") is confidential under federal law. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs some of the submitted information.

At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued

as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by subchapter C, Subtitle A of Title 45. *See* 45 C.F.R. § 160.103. In this instance, you explain that the department is a health plan under HIPAA because, as an administrator of part of the Medicaid program, the department is considered a health plan. Based on your representations, we conclude the department is a covered entity under HIPAA. Therefore, we will next determine whether the information at issue is protected health information under the federal law.

Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms as follows:

Health information means any information, whether oral or recorded in any form or medium, that:

- (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an

individual; or the past, present, or future payment for the provision of health care to an individual; and

- (i) That identifies the individual; or
- (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Protected health information means individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition, that is:

- (i) Transmitted by electronic media;
- (ii) Maintained in electronic media;
- (iii) Transmitted or maintained in any other form or medium.

45 C.F.R. § 160.103. You contend that portions of the submitted records constitute protected health information. Having reviewed the information at issue, we agree that all of this information constitutes protected health information as contemplated by HIPAA. However, we note that a covered entity may use protected health information to create information that is not individually identifiable health information, i.e., information that is de-identified. *See* 45 C.F.R. § 164.502(d)(1). The privacy standards that govern the uses and disclosures of protected health information do not apply to information that is de-identified in accordance with sections 164.514(a) and (b) of the Code of Federal Regulations. *See* 45 C.F.R. § 164.502(d)(2).

Under HIPAA, a covered entity may determine health information is not individually identifiable only under certain circumstances. One method requires a person with specialized knowledge of generally accepted statistical and scientific principles and methods for rendering information de-identifiable to apply and document such methods and principles to determine release of protected health information would result in a very small risk of individual identification. *See* 45 C.F.R. § 164.514(b)(1). The other method requires the covered entity to meet the following two criteria: 1) remove specific identifiers, including but not limited to, names, dates directly related to an individual, telecommunication numbers, vehicle identifiers, and any other unique identifying number, characteristic, or code and 2) have no actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information. *See* 45 C.F.R. § 164.514(b)(2)(i), (ii).

You assert that the department can de-identify the protected health information in the state form by redacting the month and day of any dates that relate directly to the referenced individuals. You state that “the department has no knowledge that the remaining information being released in the state form could be used alone or in combination with other information to identify the subject of the health information.” Based on our review of your representations and the information at issue, we agree that the redaction of the dates that you have marked properly de-identifies the protected health information under HIPAA. *See* 45 C.F.R. §§ 164.514(b)(2)(i)(A)-(R).

We note, however, that the requestor is the personal representative for one of the individuals whose protected health information is at issue. Under HIPAA, an individual has a right of access to inspect and obtain a copy of protected health information about the individual. 45 C.F.R. § 164.524(a)(1). Further, we note that a covered entity may not disclose protected health information without a valid authorization. Section 164.508 of title 45 of the Code of Federal Regulations states that a valid authorization must meet the following requirements:

(c) Implementation specifications: Core elements and requirements.

(1) Core elements. A valid authorization under this section must contain at least the following elements:

- (i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
- (ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
- (iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
- (iv) A description of each purpose of the requested use or disclosure. The statement “at the request of the individual” is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
- (v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement “end of the research study,”

“none,” or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

(vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative’s authority to act for the individual must also be provided.

(2) Required statements. In addition to the core elements, the authorization must contain statements adequate to place the individual on notice of all of the following:

(i) The individual’s right to revoke the authorization in writing, and either:

(A) The exceptions to the right to revoke and a description of how the individual may revoke the authorization; or

(B) To the extent that the information in paragraph (c)(2)(i)(A) of this section is included in the notice required by § 164.520, a reference to the covered entity’s notice.

(ii) The ability or inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization, by stating either:

(A) The covered entity may not condition treatment, payment, enrollment or eligibility for benefits on whether the individual signs the authorization when the prohibition on conditioning of authorizations in paragraph (b)(4) of this section applies; or

(B) The consequences to the individual of a refusal to sign the authorization when, in accordance with paragraph (b)(4) of this section, the covered entity can condition treatment, enrollment in the health plan, or eligibility for benefits on failure to obtain such authorization.

(iii) The potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by this subpart.

(3) Plain language requirement. The authorization must be written in plain language.

(4) Copy to the individual. If a covered entity seeks an authorization from an individual for a use or disclosure of protected health information, the covered entity must provide the individual with a copy of the signed authorization.

45 C.F.R. § 164.508(c). Therefore, on receipt of a valid authorization, we conclude that the department must release to the requestor the protected health information that concerns the requestor's client.

We turn now to your arguments for the remaining information, which you do not contend is personally identifiable health information protected under HIPAA. You claim that the unsigned Center for Medicare & Medicaid Services 2567 form ("CMS 2567 form") is confidential under federal law and section 142.009 of the Health and Safety Code and must therefore be withheld pursuant to section 552.101 of the Government Code.¹ Federal regulations require the department to release CMS 2567 forms, which contain a statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). Under section 401.133 of title 42 of the Code of Federal Regulations, "[t]he statement of deficiencies or report and any pertinent written statements furnished by the institution or facility on the statement of deficiencies shall be disclosed within 90 days following the completion of the survey by the State agency, but not to exceed 30 days following the receipt of the report by [the federal Centers for Medicare and Medicaid Services]." 42 C.F.R. § 401.133(a)(2).

In addition, section 142.009(d) of the Health and Safety Code provides:

The reports, records, and working papers used or developed in an investigation made under [chapter 142] are confidential and may not be released or made public except:

(1) to a state or federal agency;

¹We note that the CMS 2567 form was formerly known as the Health Care Financing Administration Form 2567.

- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule;
- (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency;
- (6) on a form required by a federal agency if:
 - (A) the information does not reveal the identity of an individual, including a patient or a physician or other medical practitioner;
 - (B) the service provider subject to the investigation had a reasonable opportunity to review the information and offer comments to be included with the information released or made public; and
 - (C) the release of the information complies with any other federal requirement; or
- (7) as provided by Section 142.0092.

Health & Safety Code § 142.009(d).

The CMS 2567 form at issue pertains to an investigation that was completed on September 29, 2003. You inform us that the request at issue was received on October 10, 2003 and note that the form does not contain the signature of an agency representative. You therefore assert that, at the time the department received this request, the service provider had not had a reasonable opportunity to review the information and offer comments as provided by the federal regulations and section 142.009(d)(6)(B) of the Health and Safety Code. Based on your representations and our review of the CMS form at issue, we conclude that the department must withhold unsigned CMS 2567 form pursuant to section 552.101 of the Government Code in conjunction with federal law and section 142.009(d) of the Health and Safety Code.

We turn now to your other arguments regarding the submitted state form. You assert that certain identified portions of the submitted state form constitute medical records subject to the Medical Practice Act ("MPA"). *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Based on your representations and our review of the information at issue, we agree that portions of the submitted state form constitute information taken from medical records and are therefore subject to the MPA. We have indicated the information that may be released only in accordance with the MPA.

You also contend that certain identifying information must be withheld from the state form under section 552.101 because it is confidential under section 142.009(d) of the Health and Safety Code. Section 142.009(d) provides that "reports, records, and working papers used or developed in an investigation . . . are confidential and may not be released or made public except: . . . (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency." Health & Safety Code § 142.009(d)(5).

You acknowledge that section 142.009(d)(5) requires the department to release the submitted signed state form. You claim, however, that this section dictates that the department withhold the identifying information that you have marked in the state form. Based on your representation that "the agency representative who signed the submitted state form is not the owner of that agency," we agree that the identifying information you have marked is confidential under section 142.009(d). *See* Health & Safety Code § 142.001(12) (defining "home and community support services agency"). Therefore, pursuant to section 552.101 of the Government Code and section 142.009(d)(5) of the Health and Safety Code, you must withhold the identifying information that you have marked in the state form.

In summary, pursuant to section 552.101 and the HIPAA privacy rules, the department must redact the specific months and days that it has marked in the submitted state form. However, on receipt of a valid authorization, the department must release to the requestor the protected health information that concerns the requestor's client. The unsigned CMS 2567 form must be withheld under section 552.101 in accordance with federal law and section 142.009. We have indicated the medical record information in the submitted state form that may be released only in accordance with the MPA. Pursuant to section 552.101, the department must withhold the portions of the state form it has marked as being confidential under

section 142.009(d)(5) of the Health and Safety Code. The remainder of the state form must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

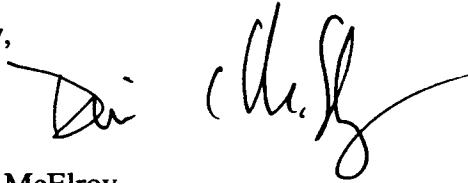
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Den C. McElroy", written in a cursive style.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 193950

Enc. Submitted documents

c: Mr. Nelson Skinner
538 West Woodlawn
San Antonio, Texas 78212
(w/o enclosures)